LIBRARY
SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
NOV 24 1970
...AVER, CLERK

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1970

No. 1005

JAMES JACKSON BLALOCK and
MERIL LANE ANDREWS, Petitioners

v.

STATE OF NORTH CAROLINA, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE NORTH CAROLINA COURT OF APPEALS

The petitioners, James Jackson Blalock and Meril Lane Andrews respectfully pray that a writ of certiorari issue to review the judgment and opinion of the North Carolina Court of Appeals entered in this proceeding on August 5, 1970

OPINION BELOW

The opinion of the North Carolina Court of Appeals is reported in 9 N. C. App. 94. The full text of the opinion of the Court of Appeals appears in the Appendix hereto.

INDEX

	Page
Opinion below	1
Jurisdiction	2
Questions presented	2
Statutory provisions involved	2
Statement of the case	3
Reasons for granting the writ	4
1. The Decision in the North Carolina Court of Appeals on Both Questions Herein Presented Denies Relief in Issues of Substance Not Previously Determined by the United States Supreme Court	4
2. The Decision of the North Carolina Court of Appeals is in Error with Respect to Each Question Presented	7
Conclusion	8
Appendix (Opinion and Judgment of Court of Appeals)	App. 1
Appearance Form	App. 10
Certificate of Service	App. 11

CITATIONS

U. S. CONST. amend. VI	2
U. S. CONST. amend. XIV, 1	3

Cases:

Hampton v. State, 120 Tex. Crim. 158, 46 S. W. 2d 314, (1932)	7
Henderson v. State, 94 Okl. Crim. 45 230 P. 2d 495, cert. den. 342 U.S. 898	6
Hill v. Sullivan, 24 Colo. App. 36, 131 P. 1040, (1913)	7
Leeks v. State, 95 Okl. Cr. App. 326, 245 P. 2d 764, (1952)	6
McNutt v. United States, 267 Fed. 670 (8th Cir. (1920)	7

People v. Aragon, 154, Cal. App. 2d 646, 316 P. 2d 370 (1957) 6
People v. Bocknick, 98 Cal. App. 2d 124, 219 P. 2d 70, (1950) 6
Tyler v. United States, 90 App. D. C. 2, 193 F. 2d 24, cert. den. 343 U. S. 908 6

Miscellaneous:

23 A.L.R. 2d, 1286 (1952) 5
21 Am. Jur. 2d, Criminal Law, 235, (1965) 8
23 C.J.S. Criminal Law, 990, (1961)..... 4
23 C.J.S. Criminal Law, 990, (1961)..... 4

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1970

No. _____

JAMES JACKSON BLALOCK and
MERIL LANE ANDREWS, Petitioners

v.

STATE OF NORTH CAROLINA, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE NORTH CAROLINA COURT OF APPEALS

WADE M. SMITH and
J. HAROLD THARRINGTON
835 Durham Life Building
Raleigh, North Carolina 27601

ROGER W. SMITH, of counsel
835 Durham Life Building
Raleigh, North Carolina 27601

Counsel for Petitioners

November 25, 1970

JURISDICTION

The judgment of the North Carolina Court of Appeals was entered on August 5, 1970. A timely petition for certiorari was filed within the North Carolina Supreme Court on August 14, 1970 and petition for certiorari was denied by the North Carolina Supreme Court on August 28, 1970. This petition for certiorari was filed within ninety (90) days of that date, This Court's jurisdiction is invoked under 28 U.S.C. 1257(3).

QUESTIONS PRESENTED

1. Whether the trial court erred when, in the presence of petitioners' witnesses who had not testified, it threatened to issue bench warrants for the arrest of any witnesses who testified to acts constituting aiding and abetting in prostitution.

2. Whether the trial court erred when it permitted the solicitor to ask petitioners' witness if he were willing to take a lie detector test concerning his sworn testimony.

STATUTORY PROVISIONS INVOLVED

1. U. S. CONST. amend. VI:

"In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

2. U. S. CONST. amend. XIV, 1:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Petitioners James Jackson Blalock and Meril Lane Andrews were each charged in separate bills of indictment with the rape of Beverly Suzanne Beam and with the rape of Patricia Ann Hinton. Trial on all indictments was had at the September, 1969, Regular Criminal Session of Wake County Superior Court before the Honorable Leo Carr, Judge Presiding, and before a jury. Each petitioner pleaded not guilty in each case.

During trial Roger Watson was called as a witness by petitioner James Jackson Blalock. (Record, page 239.) During the witness's testimony the trial judge excused the jurors and directed the solicitor's attention to the North Carolina statute on prostitution. (Record, page 267.) The trial judge stated in open court and in the absence of the jurors he intended to take action with respect to this testimony and intimated bench warrants would issue for other witnesses so testifying. (Record, page 269). Witnesses petitioner planned to offer were present in the courtroom and thereafter one witness refused to testify, referring to the Court's remonstration. (Record, pages 277, 278 and 282). Each petitioner objected to the Court's warning of witnesses and each petitioner moved for a mistrial (Record, page 274). The Court's overruling of these objections and the Court's failure to grant a mistrial was assigned as error in the North Carolina Court of Appeals and

thereafter alleged as a ground for review in the North Carolina Supreme Court by writ of certiorari.

During trial in Wake County Superior Court Donald Jones testified for petitioner James Jackson Blalock. (Record, page 292). On cross examination the solicitor asked if the witness would take a lie detector test regarding his sworn testimony. (Record, page 304). There followed a series of questions by the solicitor concerning the lie detector test and over objection of counsel for petitioner Andrews, the trial court permitted the solicitor to complete the examination. (Record, pages 302-311). The petitioners assigned this series of questions as error in the North Carolina Court of Appeals and in their petition for a writ of certiorari in the North Carolina Supreme Court.

On August 14, 1970, petitioners petitioned the North Carolina Supreme Court for a writ of certiorari and on August 28, 1970 the North Carolina Supreme Court denied the petition.

REASONS FOR GRANTING THE WRIT

I. THE DECISION IN THE NORTH CAROLINA COURT OF APPEALS ON BOTH QUESTIONS HEREIN PRESENTED DENIES RELIEF IN ISSUES OF SUBSTANCE NOT PREVIOUSLY DETERMINED BY THE UNITED STATES SUPREME COURT.

A. THE TRIAL COURT'S ADMONITION TO THE WITNESS.

It is established law that a trial judge may, in certain instances, inform a witness of his privilege not to give self-incrimirating testimony. However, where the trial court undertakes to so warn witnesses, it is encumbent upon the court not to abridge any right of the accused. 23 C.J.S. Criminal Law 990 (1961). Most of the cases which have arisen on this point have involved perjury warnings by the trial court in the presence of the jury. 23 C.J.S. Criminal

Law 996 (1961). McNutt v. United States, 267 Fed. 670 (8th Cir. 1920).

In the instant case there are additional elements which create a unique and novel situation and which point out clearly the mischief the Court's action brought about. The witness to whom the Court addressed its admonition had completed his testimony and thus the Court's remarks were addressed to the other potential witnesses in the courtroom. The Court was not warning the witnesses concerning perjury, a matter critical to the conduct of a trial. Instead, the Court promised to issue bench warrants against any witnesses whose testimony contained the elements of the crime of prostitution. Petitioners allege testimony of the true facts in the case required testimony containing elements of prostitution. The impact of the judge's remarks was rendered measurable subsequently when one of the witnesses for petitioners declined to give evidence. There is a reasonable inference of substantial impact upon other witnesses in the courtroom.

The absence of the jury and the completion of the testimony of the first witness and the refusal of a subsequent witness to testify isolates the effect of the judge's conduct enabling the Court, in this case, to define clearly the extent to which the trial court may go in warning witnesses without infringing upon the accused's rights to due process of law under the Fourteenth Amendment to the United States Constitution.

B. THE SOLICITOR'S EXAMINATION OF A WITNESS CONCERNING THE LIE DETECTOR TEST.

The Courts of this Country, in the absence of stipulation, have uniformly rejected the results of lie detector tests when offered in evidence to establish the guilt or innocence of one accused of a crime, regardless of whether it is the accused or the prosecution seeking its introduction. 23 A.L.R. 2d, 1306 (1952). The reason usually assigned for exclusion of such evidence is failure of the lie detector to

attain scientific acceptance as a reliable and accurate means of ascertaining truth or deception. Tyler v. United States, 90 App. D.C. 2, 193 F. 2d 24, cert. den. 343 U. S. 906; Henderson V. State, 94 Okl. Crim. 45, 230 P. 2d 495, cert. den. 342 U. S. 898.

The Courts have further declined to permit the introduction of lie detector results into evidence by indirection. People v. Aragon, 154 Cal. App. 2d 646, 316 P. 2d 370 1957); People v. Wochnick, 98 Cal. App. 2d 124, 219 P. 2d 70 (1950); Leeks v. State, 95 Okl. Cr. App. 326, 245 P. 2d 764 (1952).

In the instant case the solicitor asked the witness a series of questions and made certain statements concerning a private conversation between himself and the witness at some previous time. Thereafter, the solicitor asked the witness if he would take a lie detector test concerning his sworn testimony. This line of questioning continued and counsel for petitioner Andrews requested an instruction from the Court to the jury as to the inadmissibility of such tests. The Court declined to give the instruction and permitted the solicitor to continue to cross examine with respect to the lie detector until the witness answered he would take the test as to some things but not as to sworn testimony in open court.

The majority of decisions in this area deal with questions propounded to an accused concerning the lie detector or evidence that an accused did or did not take such a test. In the case at hand, the Court is presented an opportunity to consider the extent to which a prosecutor for the State or counsel for an accused may cross-examine a witness, in the presence of the jury, as to his willingness to submit to a scientific test to determine the truth of his statement without encroaching upon the accused's Six Amendment right to trial by an impartial jury. The solicitor could have just as easily asked if the witness would submit to some other scientific test the result of which is not admissable. It is submitted a pronouncement from the Supreme Court defining

the limitations upon counsel for the accused or for the State with respect to such cross-examination would be beneficial.

II. THE DECISION OF THE NORTH CAROLINA COURT OF APPEALS IS IN ERROR WITH RESPECT TO EACH QUESTION PRESENTED.

A. THE TRIAL COURT'S ADMONITION TO THE WITNESS WHO HAD TESTIFIED AND THUS TO ANY REMAINING WITNESSES IN THE COURTROOM IS CONTRARY TO ESTABLISHED AUTHORITY, THOUGH IT IS SUBMITTED THERE ARE NO AUTHORITIES CLEARLY IN POINT.

In McNutt v. United States, 267, Fed. 670 (8th Cir. 1920), a witness for the government testified favorably for the defendant and contrary to an affidavit he had made when the defendant was indicted. At the end of his testimony, without excusing the jury, the trial judge instructed the district attorney to file an information against the witness for perjury. This conduct was held to be prejudicial error calculated to impress the other witnesses with the imminent danger of arrest for perjury if they failed to answer questions as the prosecution desires and it was also held to be an indication to the jury of the court's opinion of the guilt of the defendant.

In Hampton v. State, 120 Tex. Crim. 158, 46 S. W. 2d 314, (1932), the trial court, in the absence of the jury, told a witness who was giving testimony favorable to the defendant that he was telling lie after lie. The judge then directed the district attorney to file a complaint against the witness when the trial was over. On appeal, the Court held that such action was reversible error as it appeared from the record that thereafter, the testimony of the witness was more favorable to the State than previously.

In Hill v. Sullivan, 24 Colo. App. 36, 131 P. 1040, (1913), the trial judge, in the absence of the jury, had two of the defendant's witnesses brought before him. After informing

them he believed they had committed perjury, he ordered them placed under bond. The Court held the action of the trial judge tended to place the other defense witnesses in fear and therefore, possibly deprived the defendant of advantageous testimony.

In the instant case, the Court effectively intimidated potential witnesses for petitioners and prevented their freely and objectively deciding whether or not to testify. "A fair trial means one in which there is no bias orprejudice for or against the accused, and in which not only the witness chair and the jury box, but the courthouse also, are purged of every suspicious circumstances tending to take from the accused any of the rights given to him by law." 21 Am. Jur. 2d, Criminal Law, 235 (1965).

B. WHEN THE TRIAL COURT PERMITTED THE SOLICITOR TO CROSS-EXAMINE WITH RESPECT TO THE LIE DETECTOR, IT ALLOWED THE JURORS TO CONSIDER EVIDENCE OF A LIE DETECTOR TEST.

It was implanted in the minds of the jurors that the witness must be lying or he would have been willing to submit to a lie detector test. Since the witness so examined had contradicted the testimony of the State's prosecuting witnesses, the effect was to create doubt in the juror's minds as to the truth of the witness so impeached. The impact of such cross-examination upon a trial is readily apparent.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment of the North Carolina Court of Appeals.

Respectfully submitted,

WADE M. SMITH
J. HAROLD THARRINGTON
Counsel for Petitioners
835 Durham Life Building
Raleigh, North Carolina 27601

ROGER W. SMITH, of counsel
835 Durham Life Building
Raleigh, North Carolina 27601

November 23, 1970

APPENDIX

No. 7010 SC 235 Tenth District

NORTH CAROLINA COURT OF APPEALS

Fall Session 1970

STATE OF NORTH CAROLINA

v. From Wake

JAMES JACKSON BLALOCK
and MERIL LANE ANDREWS

APPEAL from Carr, J., 2 September 1969 Regular Criminal Session, WAKE County Superior Court.

The defendants in this case, Meril Lane Andrews (Andrews) and James Jackson Blalock (Blalock), were indicted by the Grand Jury at the August 1969 Regular Criminal Session of Wake County Superior Court in two bills of indictment each in which they were charged with the rape of Beverly Suzanne Beam and Patricia Ann Hinton. Upon arraignment each defendant entered a plea of not guilty to each charge against him and upon motion of the solicitor and with the consent of each of the defendants the four cases were consolidated for trial.

The evidence at the trial tended to show the facts to be as follows: On the night of 24 July 1969 Patricia Ann Hinton left her house at 702 Edmunds Street in the City of Raleigh to buy a bottle of liquor. Finding the A.B.C. stores all closed she went to a house on Linden Avenue where she purchased some liquor from the defendant Andrews. When she returned to her home she was visited by some neighbors. Following their visit she took a drink and talked on the telephone until about 10:30 p.m. She then lay down on her sofa and took a nap. She was awakened by a knock on her door and when she opened it the defendant Andrews, along with Thomas Moody, entered the house and were followed by several other people. Andrews fixed a drink and told her to have a drink with him. About this time Thomas Moody asked her to go with him and she went with him into the bedroom where they had sexual intercourse. She

testified that after Moody had intercourse with her the defendant Blalock came "busting" through the door, threw her down on the bed and jumped on top of her, and made her engage in some unnatural sexual acts with him. Andrews came into the room and while Blalock sat on her, he had intercourse with her after which Blalock had intercourse with her also, all against her will. During the time this was occurring, Blalock burned her with a cigarette in several places on her body. After Blalock and Andrews finished with her she dressed and went down the hall to call the police. She testified that she heard someone yell that she was going to call the police and that just as she got the receiver in her hands Blalock came running out of the other bedroom, grabbed the receiver from her and jerked the phone off the wall. Then he threw her against the side of the wall and called her names while hitting her on the arm with the receiver. When she got free from Blalock she ran out the front door and went to a neighbor's house to call the police. The neighbor, however, was not home so she returned to her own house where she found that the crowd had left. She went in, locked the door and did not remember anything until the police came the next morning. Early the next morning two policemen came to her door and asked her what had been going on. She at first denied that anything had been going on there but when informed by the policeman that another girl had claimed to have been raped there the previous night, she told officers that she had been raped also. She was taken to the Raleigh Municipal Building where she signed warrants against the two defendants.

Beverly Suzanne Beam testified that on the night in question she had been at The Keg, a tavern in the City of Raleigh, with another girl who was engaged to Blalock. They left the Key and went to the other girl's apartment where Miss Beam had intended to spend the night. By prior arrangement she was to have had a date that night with Andrews while Blalock and the other girl also had a date. After Blalock and Andrews arrived, she decided that she did not want to spend the night there and asked the defendants to take her home. Upon leaving the home of the other

girl, the defendants drove to the home of Mrs. Hinton and parked there telling her they would be right back. About ten minutes later Blalock returned and asked her to come inside. When she entered the house she found a large crowd there including many of the witnesses who later testified in this case. Very soon after she got in the house, Thomas Moody grabbed her by the arm and hurt her. She ran out of the house but Moody and Blalock followed her and got her to return. When she returned to the house she went into bedroom with Moody where they stayed for a few minutes before returning to the other room. Moody and Andrews talked for a few minutes and then Moody came over to her and told her they were going back into the bedroom. At this time Andrews slapped her several times and told her that she was going to do what he told her to do and nobody else. Upon their return to the bedroom, Moody told her that they were going to have sexual intercourse. She testified on voir dire, in the absence of the jury, that Moody told her that if she did not have intercourse with him she would not live to tell it, and that he gave her three examples of girls who had been beaten or killed in recent years. After Moody had intercourse with her, she testified that Andrews came in and told Moody to leave. Blalock came into the room and he and Andrews forced her to engage in unnatural sexual acts with them. Someone yelled that Mrs. Hinton was going to call the police and both men dressed and ran out of the bedroom. The defendants left the house and took her to 202 Linden Avenue where they left her. She ran from the house and met a policeman from whom she borrowed a dime to make a phone call. The policeman followed her to Watkins Grill where she called a cab. The owner of the grill asked if he could help her and she agreed to allow him to take her home. She and the grill owner got into a car driven by Deputy Sheriff Maylon Bagwell and after they had gone approximately two miles she told them she had been raped by two men whose identity she did not know. They took her to the police station where she identified the defendants from pictures shown her and she then signed warrants against them.

The State offered medical evidence from three doctors

which was to the effect that the female organ of each of the prosecuting witnesses contained sperm cells which had apparently been deposited recently.

The defendants offered the testimony of several witnesses to the effect that they met Mrs. Hinton at 202 Linden Avenue on the night in question and that she accompanied them to her house on Edmunds Street where they were to have a party. Entrance to the house was gained by one of the witnesses climbing through a window because Mrs. Hinton had lost her key. The witnesses testified that as soon as they entered the house, Moody and Mrs. Hinton went to one of the bedrooms and that thereafter each of the men at the party went to the bedroom where they had intercourse with Mrs. Hinton. While Donald Jones was in the bedroom they heard a knock at the door and the voice of a man claiming to be a policeman. The people all tried to escape from the house but when the door was opened they found that it was the defendants. Moody and Blalock persuaded Miss Beam to come in and eventually Moody went to the back bedroom with her. There was no testimony from any of the witnesses that they believed anyone was being forced to engage in sexual relations against his or her will during the night.

In rebuttal the State offered the evidence of Thomas Moody who testified that on the night in question he was in the Hinton home and that he saw the defendant Andrews slap Miss Beam. He testified that he had intercourse with both of the prosecuting witnesses with their consent.

Each defendant was convicted by the jury of assault upon a female over twelve years of age with the intent to commit rape in the case of Beverly Suzanne Beam and with assault upon a female in the cases involving Patricia Ann Hinton. Each defendant was sentenced to fifteen years imprisonment in the cases involving Beverly Suzanne Beam and each was given a consecutive six months sentence and a $500 fine in the cases involving Patricia Ann Hinton. The defendants each appealed to the North Carolina Court of Appeals,

assigning error.

Robert Morgan, Attorney General, Eugene A. Smith, Assistant Attorney General, and Howard P. Satisky, Staff Attorney, for the State.

Hatch, Little, Bunn, Jones and Leggett, by E. Richard Jones, Jr., and William P. Few, for defendant appellants.

HEDRICK, J.

(1) By assignments of error numbers 1, 3, 4, 7 and 14, the defendants contend that the trial judge, during the course of the trial, made remarks and asked questions of some of the witnesses which amounted to an expression of an opinion by the judge in violation of G. S. 1-180. In North Carolina it is improper for a trial judge to question a witness for the purpose of impeaching his testimony. State v. Perry, 231 N.C. 467, 57 S.E. 2d 774 (1950). However, it is a well settled rule in this State that a trial judge may ask questions of a witness in order to obtain a proper understanding and clarification of the witness' testimony. State v. Strickland, 254 N. C. 658, 119 S.E. 2d 781 (1961); State v. Humbles, 241 N. C. 47, 84 S.E. 2d 264 (1954); State v. Stevens, 244 N. C. 40, 92 S.E. 2d 409 (1956); State v. Furley, 245 N.C. 219, 95 S.E. 2d 448. This rule is a necessary one in our system of criminal law since there are times during the course of a trial, and especially in a trial involving facts as complicated as in the present case, when the judge finds it necessary to ask the witness competent questions to aid in clarifying the witness' testimony. State v. Hoyle, 3 N.C. App. 109, 164 S.E. 2d 83 (1968); State v. Perry, supra.

We have examined the testimony of these witnesses and after considering the questions propounded by the judge, in

light of all the attendant facts and circumstances, we believe that the questions asked by the judge were for the purpose of clarification and were not expressions of opinion, and did not tend to impeach the testimony of the witnesses, These assignments of error are overruled.

(2) The defendants contend that the court erred in threatening to issue bench warrants for the arrest of any witnesses who testified that they participated in the crime of aiding and abetting prostitution. The record shows the facts to be as follows: Roger Watson, testifying for the defense, stated that everyone at the house that night, including himself twice, had intercourse with Pat Hinton. Following this testimony, Judge Carr excused the jury and called the solicitor's attention to the provisions of G.S. 14-203 and G.S. 14-204 relating to prostitution. He stated that he felt the witness had violated this statute but that he had grave doubts about the corpus delecti. When reminded by one of the defendant's attorneys that the witnesses were present, Judge Carr stated that he wanted them to know what the law was and what the consequences of their actions could be under the law. After the jury returned, the record shows that Donnie Marshburn and Donald Jones took the witness stand and testified that each of the men present on the night in question took turns going into the bedroom of Pat Hinton where they had intercourse with her.

The record is clear that the remarks by Judge Carr had no adverse affect on the two witnesses that testified after he had informed them of the possible consequences of their testimony. This assignment of error is overruled.

The defendants argue that the court committed prejudicial error in allowing the solicitor on cross-examination to ask one of the defendant's witnesses whether he would be willing to take a lie detector test as to his testimony. The record discloses that the solicitor asked the witness Jones the following question: "Will you take a lie detector test regarding your testimony today." No objection appears in the record as to this question or the answer. Later, the

witness was asked the same question and an objection was made by the attorney for the defendant Blalock who afterwards stated that he had no objection to the question being asked once more; whereupon, the question was asked the third time without any objection and the witness answered. Subsequently, an attorney for the defendant Andrews stated to the court that this is highly improper and asked the court to instruct the jury on the admissibility of lie detector test in North Carolina. Later, when the question was asked for the fourth time, counsel for one of the defendants objected.

(3-5) It is the general rule that unless an objection is made at the proper time, it is waived. Stansbury, N. C. Evidence, 2d Ed., Sec. 27, page 49. In case of a specific question, objection should be made as soon as the question is asked and before the witness has had time to answer. Stansbury, N. C. Evidence, 2d Ed., Sec. 27, page 51, and cases cited thereunder. If testimony offered by a witness is not competent, objection to its admission should be interposed to the question at the time it was asked and when the objection is not taken in apt time it is waived. State v. Hunt, 223 N.C. 173, 25 S.E. 2d 598 (1943). The defendants waived any objections they might have had to the question by failing to object in apt time the first three times it was asked. This assignment of error is overruled.

(6) By assignment of error 16, based on exceptions 8, 9 and 21, the defendants challenged the court's rulings in denying their motions for judgment as of nonsuit. The defendants have failed to argue this assignment in their brief, and the same is therefore deemed abandoned. Moreover, in their brief, the defendants state: "Defendants concede that there was sufficient evidence, taken in the light most favorable to the State, to sustain a conviction for rape in each case."

(7) By assignment of error 17 the defendants contend that the court committed prejudicial error in defining assault as an attempt or offer with force and violence or with rudeness

to do hurt to another. The defendants in this argument have lifted one sentence out of the court's charge and attempted to show that the definition is incorrect and inadequate. When the charge is considered contextually, it is our opinion that the court properly and adequately instructed the jury as to all the elements of the crimes for which the defendants were being tried. This assignment of error is without merit.

(8-9) By assignments of error numbers 18, 20, 21 and 22, the defendants contend that the court committed prejudicial error in reviewing the evidence for the State and the defendants, and in stating their contentions. Generally, an inadvertence in stating the contentions of the parties or in recapitulating the evidence must be called to the trial courts attention in time for correction. 3 Strong, N. C. Index 2d, Criminal Law, Sec. 113, page 15, The record fails to show that this was done in the instant case. We have examined each portion of the charge to which all these exceptions are directed and find no material misstatement of the evidence or contentions of the State or the defendants. Those portions of the charge excepted to related to subordinate features of the case, and even if it can be said that the judge inadvertently misstated some of the contentions, the defendants have failed to show that they were in any way prejudiced by such statements. These assignments of error are overruled.

The defendants contend that the judge committed error in his charge by the unqualified use of the words "assault" and "rape" or "raping" in referring to the charges against the defendants. They argue that the Judge, by the use of these words, was leading the jury to assume that the facts in controversy had been established. We do not agree with this contention. The charge, when read as a whole, does not show that the judge in any manner expressed any opinion in violation of G.S. 1-180 in reviewing the evidence or stating the contentions of the defendants. This assignment of error is without merit.

We have examined all of the defendant's exceptions and assignments of error brought forward on this appeal and conclude that the defendants had a fair trial in the superior court free from prejudicial error.

No error.

BROCK AND BRITT, JJ., concur.

App. 10

APPEARANCE FORM

SUPREME COURT OF THE UNITED STATES

No._____, October Term, 1970

JAMES JACKSON BLALOCK and
MERIL LANE ANDREWS, Petitioners

v.

STATE OF NORTH CAROLINA, Respondent

The Clerk will enter my appearance as Counsel for the Petitioners:

Wade M. Smith

WADE M. SMITH
835 Durham Life Building
Raleigh, N. C. 27601

The Clerk is requested to notify counsel of action of the Court by means of Airmail Letter.

The person to be notified for Petitioners is:

WADE M. SMITH
835 Durham Life Building
Raleigh, North Carolina 27601

App. 11

CERTIFICATE OF SERVICE

SUPREME COURT OF THE UNITED STATES

No. _____, October Term, 1970

JAMES JACKSON BLALOCK and
MERIL LANE ANDREWS, Petitioners

v.

STATE OF NORTH CAROLINA, Respondent

I hereby certify that on this 23rd day of November, 1970, three copies of the Petition for Writ of Certiorari were personally delivered to Robert Morgan, Attorney General, Eugene A. Smith, Assistant Attorney General, and Howard P. Satisky, Staff Attorney, Justice Building, Raleigh, North Carolina, for the Respondent, the State of North Carolina. I further certify that all parties required to be served have been served.

Wade M. Smith

WADE M. SMITH
835 Durham Life Building
Raleigh, North Carolina 27601
Counsel for Petitioners

J. HAROLD THARRINGTON
Counsel for Petitioners

ROGER W. SMITH, of counsel